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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-353

A. L. ABBOTT, et al., *Petitioners,*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Claims

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No.

A. L. ABBOTT, et al., *Petitioners,*

vs.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Claims

The 2,079 petitioners herein are retired officers and enlisted personnel, regular and reservist, of the Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration. Petitioners request that a writ of certiorari issue to review the judgment of the United States Court of Claims denying petitioners' motion for partial summary judgment on the issue of liability, and granting the United States' motion to dismiss the petition.

OPINION BELOW

The opinion of the Court of Claims of January 18, 1973, is not yet reported. It is printed in Appendix A at p. 1a, *infra*.

JURISDICTION

On January 18, 1973, the Court of Claims entered its opinion and judgment denying petitioners' motion for partial summary judgment on the issue of liability and dismissing petitioners' action. On February 16, 1973, petitioners filed a timely petition for rehearing, which was denied without opinion on April 13, 1973. Mr. Chief Justice Burger signed an order on June 14, 1973, extending the time in which to file this petition for writ of certiorari to and including August 31, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Do petitioners and all other retired federal uniformed personnel have a property right to their earned retired pay?[1]

2. Does that property right encompass a vested right to the basis of computation of such pay pre-

[1]It is petitioners' position that their retired pay is deferred compensation for past service and that this Court therefore need only resolve questions 1, 2 and 3. Questions 4 and 5 need be faced only if this Court, or the Court of Claims on remand, were to hold such pay to be current pay for reduced, standby service. Accordingly, those two questions are only noted herein, but will be urged as alternative grounds for reversal if a hearing is granted.

scribed by law in effect (a) during their full performance of service upon which such pay is based and on the date of retirement from active service, or (b) during their full or substantial performance of such service but not on the date of retirement from active service?

3. Do Acts of Congress reducing the basis for computation of such federal retired pay deprive those already entitled to such pay of property without just compensation?

4. Do Acts of Congress denying retired federal uniformed personnel any retired pay, although they had pay withheld during their active service as a means of funding that pay, deprive them of property without just compensation?

5. Do Acts of Congress prescribing different rates of "retired" pay for equal current service, based solely on different retirement dates, result in unconstitutional discrimination?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

In 1956, Congress codified into positive law provisions for recomputation of the pay of retired members of the armed forces whenever active duty base pay scales were changed. See former 10 U.S.C. §§1401, 3991, 6149, 6151, 6325-27, 6381, 6383, 6390, 6394, 6396, 6398-6400, 8991, 70A Stat. 1, 106, 232, 385-86, 394-96, 404-06, 410-11, 413-14, 556-57. Those provisions were made applicable to members of the other uniformed

services by virtue of 33 U.S.C. §857a, and 42 U.S.C. §213a. See also 14 U.S.C. §423.

The 1956 provisions were suspended in 1958 by §§3 and 4 of P.L. 85-422, 72 Stat. 122, 128, and were repealed in 1963 by §5 of P.L. 88-132, 77 Stat. 210, 212-15. An example of the 1956 provisions, together with the relevant portions of §§3 and 4 of P.L. 85-422, and the Fifth Amendment to the United States Constitution, are set forth in Appendix B at p. 9a, *infra*.

STATEMENT OF THE CASE

Petitioners' claims are founded on the United States Constitution. Jurisdiction of the Court of Claims was invoked under 28 U.S.C. §1491.

In an action on behalf of themselves and all other retired federal uniformed personnel, petitioners seek either the restoration of or compensation for their retirement rights under the repealed pay statutes listed above. Those statutes provided a recomputation system under which petitioners' retired pay was (1) initially computed as a fixed percentage of the base pay (exclusive of allowances and other benefits) for the rank each held at his retirement, and (2) recomputed whenever the active duty base pay for that rank was increased or decreased.[2]

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[2]While in recent years base pay has been consistently increased, in the past it has been reduced and retired pay was reduced proportionately. See *Federal Staff Retirement Systems*, Sen. Doc. No. 14, 90th C., 1st S. pp. 371-72 (1967) (pay of officers reduced 38 1/3% and pay of enlisted personnel reduced 30% between 1932 and 1935). See also *Hearings on Recomputation and Other Retirement Legislation*, H.A.S.C. No. 92-78, 92d C. 2d S. pp. 17341-44 (1972).

That recomputation system was in effect pursuant to successive pay statutes from 1870 to 1958, and was considered "the principal traditional benefit" of a career with the uniformed services.[3] Each petitioner made a lifetime career commitment, and served until involuntarily retired after a minimum of 20 years active duty with the uniformed services, in justifiable reliance on the Government's assurances that his retired pay would be measured pursuant to the recomputation system. Petition 23-26.

During their active service, petitioners' total pay rates were intentionally depressed 6½% by Congress as a means of funding petitioners' prospective retired pay. *Id.* at 26-27. Thus, each petitioner contributed substantially to the funding of his promised retired pay as additional consideration for such pay. Congress has recognized petitioners' contributions by its grant of longevity credit for military service, without additional contributions, to those who abandon a military career before qualifying for retirement, and who thereafter join the civil service retirement system. 5 U.S.C. §§8332(c), 8334(g)(2). These contributions

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[3] *Report of the Defense Advisory Committee on Professional and Technical Compensation* p. 136 (1957). The principal events concerning recomputation are set forth in Appendix C at p. 11a, *infra*. For brief legislative histories of military retirement, see *Federal Staff Retirement Systems*, Sen. Doc. No. 14, 90th C. 1st S. pp. 357-73 (1967); and *Hearings on Recomputation and Other Retirement Legislation*, H.A.S.C. No. 92-78, 92d C. 2d S. pp. 17321-54 (1972).

have also been recognized administratively, at least since 1926.[4]

Retention of the recomputation system was particularly vital to petitioners because the uniformed services, unlike the civil service, use the "retirement" system not only to maintain a minimum income during old age, but also, by systematic early retirement, to ensure that the armed forces remain youthful and vigorous. As a consequence, the overwhelming majority of retired regular personnel of the uniformed services, including petitioners, were routinely and involuntarily retired in mid-life. Petition 30-33.

Early, forced "retirement" has been detrimental to petitioners in two respects. First, their immediate income was drastically reduced when their financial needs were at their peak. Their retired pay is set as a percentage (as low as 50%) of their former base pay which, in turn, may represent only about 50% of their active pay.[5] Thus, their retired pay may be as little as 25% of the pay they received immediately before retirement. Inevitably, therefore, they were

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[4]The Department of Defense and its predecessor have recognized the retirement contribution at least since 1926. See Appendix C, at p. 11a, *infra* (1926-30 entry). See also *Defense Study of Military Compensation, Cost and Value of Military Compensation*, SGMC/MA-2, pp. 51-52 (1962) (interest calculated at 3% on contributions): *Report to the President on the Study of Uniformed Services Retirement and Survivor Benefits by the Interagency Committee* p. 1-5 (1971); *Report of the 1971 Quadrennial Review of Military Compensation* p. 2-3 (current rate of contributions is 7%); *Hearing before the Subcommittee on General Legislation of the Committee on Armed Service* [*of the*] *United States Senate on H.R. 4606*, 92 C., 2d S. p. 11 (Sept. 19, 1972) (same).

[5]2 *Report of the First Quadrennial Review of Military Compensation* p. 20 (1967).

and are forced to seek a second career. Second, petitioners suffer substantial income losses because of their late entry into a second career at the bottom of a new career ladder. The Government acknowledges that those losses are an inevitable *public* cost of a youthful defense force, which should be borne by all taxpayers, not by retired members of the uniformed services alone. Petition 31-32.

With respect to retirement income, there is a decided disparity in treatment between retired members of the uniformed services and retired civil servants under the current retirement system. Contrary to a commonly held view, the former receive a substantially smaller lifetime net benefit from their retired pay, despite their early retirement, than do members of the civil service.[6] There are several reasons for this difference. Civil servants (1) enjoy longer service at full pay, during which time they suffer no income loss; (2) retire at higher ranks, giving them a higher pay scale by which their retired pay is measured; (3) receive a higher percentage of that higher scale, because of their greater longevity; and (4) receive the benefits of any increases in the general standard of living between the time their military counterparts retire in mid-life and they later retire at old age.[7] Thus, in effect, civil servants receive bene-

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[6]5 *Report of the First Quadrennial Review of Military Compensation* p. VII-42 (cols. 1 & 6) (1969).

[7]*Id.* note 6, *supra*, at pp. VII-13 & 14. Of course, when a civil servant is involuntarily forced to accept early "retirement" (e.g. by reduction in staff), he too may face the problems routinely met by "retired" members of the regular uniformed services. See, e.g., *Cancelled Careers, A Report to the Special [Senate] Committee on Aging*, 92 C., 2d S. *passim* (May, 1972) (Committee Print).

fits similar to those formerly provided to petitioners by the recomputation system.

With respect to retirement income, there is also a disparity in treatment among retired uniformed personnel under the current retirement system. Petitioners' pay is based on the differing active duty pay scales in effect when they each were retired. Each new increase in active duty pay rates results in greater disparity in pay among petitioners of equal rank and longevity solely as a result of their differences in age. Petition 33-34.[8] A glaring example of the extent of discrimination now imposed is the difference in treatment between retired reservists, whose commitments are generally minimal beyond standby duty, and active career members who retire after at least 20 years of active service. A reservist's retired pay is measured by the pay scales in effect when he reaches age 60, not at the time of his retirement. See 10 U.S.C. §1331. An active career member's retired pay, in contrast, is determined by the pay scales in effect at the time he is retired, which can be as early as age 37. See 10 U.S.C. §1401. Thus, assuming "basic pay . . . is to increase . . . 5% per year . . . [and] the CPI is . . . to increase 1.5% per year," the reservist who "retires" today at age 37, will receive 80.5% more pay

[8]See also *Report of the U.S. Veterans Advisory Commission* p. 72 (1968) (eight different rates of pay). There are now 11 different rates of pay for the same duty based on rank and longevity.

when he reaches age 60 than will his active career counterpart who "retires" at the same age today.[9] In addition, the reservist will suffer no second career income loss, since his normal civilian career will not be disrupted by military service. No such discrimination existed under the recomputation system.

The cost of the recomputation system was not questioned until 1958. See Appendix C, at pp. 11a-18a, *infra, passim.* Since World War II, however, a much enlarged defense force has been established and maintained. That change inevitably increased accrued federal retirement obligations. Petition, Exhibit 6-5. Although those obligations remained "deferred [public] costs of World War II and the Korean conflict and the present national security requirements,"[10] those costs were not fully borne by the general public. In 1958, wholly as a matter of economy, Congress suspended petitioners' accrued recomputation rights (P.L. 85-422), and then in 1963 repealed the recomputation system and imposed a new retirement system upon them (P.L. 88-132). Petition 27, and Exhibit 6-3 et seq. The pay petitioners have received under this new system is substantially less than what they should have received under the recomputation system in effect when they were on active service and when

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[9]Under the current system, petitioners' retired pay is adjusted after retirement in accordance with the Consumer Price Index, not the current active duty base pay scales. 10 U.S.C. §1401a. The quoted assumptions are from the *Summary of the Report of the Interagency Committee on Retirement and Survivor Benefits* p. S-12, n.1 (1971).

[10]*A Study of the Military Retired Pay System and certain Related Subjects, Report of the Study Committee of the University of Michigan to the [Senate] Committee on Armed Services,* 87th C., 1st S. p. 80 (1961) (Committee Print).

they retired. See *id.*, Exhibit 5, for examples. Thus, in effect, Congress took pay from petitioners and all other retired federal uniformed personnel to increase the pay of active duty personnel. Congress thereby substantially reduced the public cost of an expanded defense force at the expense of petitioners and all other such retired personnel.

REASONS FOR GRANTING THE WRIT

1. DEPENDING ON THE NATURE OF PETITIONERS' FEDERAL RETIRED PAY, THE DECISION BELOW CONFLICTS EITHER WITH DECISIONS OF THIS COURT OR WITH DECISIONS OF THE APPELLATE COURTS OF SEVERAL COMMUNITY PROPERTY STATES.

a. The decision below failed to define the nature of petitioners' retired pay.

The nature of petitioners' retired pay must be determined before the constitutional issues petitioners have raised can be resolved. The opinion below did not discuss or define the nature of that pay and rejected petitioners' constitutional claims solely on the basis of *Akerson v. United States,* 175 Ct.Cl. 551 (1966), cert. den. 385 U.S. 946 (1966), and *Andrews v. United States,* 175 Ct.Cl. 561 (1966), reproduced in Appendix E, at p. 23a, *infra.* Petitioners in *Akerson* contended that the provisions of the 1958 Act were not intended to apply to persons already retired. Therefore, *Akerson* resolved no constitutional issues. Petitioners in *Andrews* sought relief from the 1958 Act on the basis of an asserted vested contractual right to recomputation. Since a public officer's pay for current service may be reduced prospectively (see cases cited in *Andrews,* 175 Ct.Cl. at 563, Appendix at

24a-25a), those petitioners necessarily founded their constitutional claims on the view that their pay was deferred compensation for past services.

The *Andrews* opinion also did not discuss or define the nature of retired pay of the uniformed services. It merely held that retired military "officers have no vested or contractual right to any particular amount of retired pay." 175 Ct.Cl. at 563, Appendix at 24a.[11] That decision was based primarily on *Bell v. United States,* 366 U.S. 393, 401 (1961). See *Norman v. United States,* 183 Ct.Cl. 41, 49, 392 F.2d 255, 259 (1968), cert. den., 393 U.S. 1018 (1969). In *Bell,* however, this Court rejected an attempt by the Government to deprive soldiers of earned compensation because of alleged disloyal conduct during the Korean

[11]Because *Andrews* did not define the nature of their retired pay, petitioners herein based their constitutional claims below both on the view that it was deferred compensation for past service and on the view that it was compensation for current standby duty.

First, if their retired pay is deferred compensation for past service, petitioners sought, for enlisted personnel who served pursuant to written contracts (whose interests were not represented in *Andrews*), as well as for officers:

(a) Restoration of the right to recomputation or just compensation for the taking of that right. Petition 23-29 (First and Second Causes of Action); or,

(b) Recomputation on reaching age 62, on the grounds that their retired pay (i) could not rationally be considered current standby pay after each reaches the mandatory age of retirement; and (ii) is not standby pay before reaching that age, but a second career income supplement. Petition 29-33 (Third and Fourth Causes of Action).

Second, if their "retired" pay is for current reduced service, petitioners sought:

(a) Equal pay for equal standby service. Petition 33-35 (Fifth and Sixth Causes of Action); and/or,

(b) The return of the contributions they made towards the funding of their retired pay, plus interest. Petition 36-37 (Seventh Cause of Action).

conflict. This Court expressly stated: "If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include the forfeiture of future *but not of accrued pay.*" 366 U.S. at 401 (emphasis added). *Bell* is, therefore, inconsistent with the decision in *Andrews* if retired pay is deferred compensation for past service.

The United States concedes that petitioners' retired pay is earned compensation, not a gratuity.[12] Their retired pay must therefore have been earned in the past, while on active duty, or it must be earned currently for continuing standby duty.

An analysis of various statutes concerning retired military status supports the view that petitioners' pay after retirement, like that of civilan employees generally, is deferred compensation for past services. See Appendix D, at p. 21a, *infra.* The old view was that military "retired" pay was compensation for reduced but continuing, current service. See, e.g., *United States v. Tyler,* 105 U.S. 244, 246 (1882); *Lemly v. United States,* 109 Ct.Cl. 760, 763, 75 F. Supp. 248, 249 (1948). However, the old view predates the establishment and maintenance of a substantial reserve force since World War II.[13] That view is also inconsistent with the current law governing retired pay. See 2a, *infra.* Therefore, this Court, or the Court of Claims on remand, should resolve the first question

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[12]Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion To Dismiss 7.

[13]See 10 U.S.C. §§672-674, codified in 1956, and based on the Act of July 9, 1952, Ch. 608, §§206, 233, 66 Stat. 483, 489.

presented (see p. 2, *supra*), and determine that petitioners' retired pay is deferred compensation for past services. In any event, whether petitioners' retired pay was earned in the past or is earned currently, the decision below either conflicts with decisions of this Court or of appellate courts of several community property states. This Court should therefore grant petitioners' request that a writ of certiorari be issued.

b. If petitioners' retired pay is deferred compensation for past services, then the decision below conflicts with decisions of this Court.

The power of the Government to reduce the pay of a public officer does not extend to compensation prescribed by the statutes in effect when his services were rendered. *Bell v. United States, supra; Mississippi ex rel. Robertson v. Miller,* 276 U.S. 174 (1928); and *Fisk v. Police Jury,* 116 U.S. 131 (1885). As held in *Miller:*

> . . . [A]fter services have been rendered by a public officer under a law, specifying his compensation, *there arises an implied contract* under which he is entitled to have the amount so fixed. *And . . . constitutional protection extends to such contracts* just as it does to those specifically expressed. . . .
>
> (276 U.S. at 179, emphasis added.)

The 1963 Act repealing the recomputation system substantially reduced the retired pay petitioners would otherwise have received. If petitioners' retired pay as measured by the recomputation system is de-

ferred compensation for past service, as petitioners contend, then the decision below is in direct conflict with decisions of this Court. Therefore, this Court should grant the writ, resolve the second and third questions presented (see pp. 2-3, *supra*), and hold that the 1963 statute repealing the recomputation system is unconstitutional as applied to petitioners.

c. If petitioners' retired pay is compensation for current services, then the decision below conflicts with decisions of appellate courts of several community property states.

The nature of military retired pay has been frequently raised in divorce proceedings. Appellate courts of several community property states have held that such pay is compensation for past services and that divorced wives of retired federal uniformed personnel are therefore entitled to a community share of future payments received after the marriage is terminated. See, e.g., *Busby v. Busby,* 457 S.W.2d 551 (Tex. 1970); *LeClert v. LeClert,* 80 N.M. 235, 453 P.2d 755 (1969); *Morris v. Morris,* 69 Wn.2d 506, 419 P.2d 129 (1966); *In re Karlin,* 24 C.A.3d 25, 101 C.R. 240 (1972). But see *French v. French,* 17 C.2d 775, 112 P.2d 235 (1941) (concerning standby retainer pay of the Fleet Reserve).[14] This rule has even been extended to cases where the husband has served the requisite period of 20 years to qualify for retirement but has not yet been transferred to the retired list. See,

[14]On June 20, 1973, the Supreme Court of California granted a hearing in *In re Fithian,* 4 Civil No. 12269 (1973) (certified for non-publication) in which the California Court of Appeal, Fourth Appellate District, Division Two, rejected the contention that retired military pay is compensation for current service.

e.g. *Bensing v. Bensing*, 25 C.A.3d 889, 102 C.R. 255 (1972); *Webster v. Webster*, 442 S.W.2d 786 (Tex. Civ. App. 1969); *Mora v. Mora*, 429 S.W.2d 660 (Tex. Civ. App. 1968).

Thus, if petitioners' "retired" pay is for current standby service, the decision below is in direct conflict with the state decisions cited above, and this Court should grant the writ and resolve the fourth and fifth questions presented. See p. 3, *supra*.[15]

d. This Court should resolve the nature of petitioners' retired pay so that the Government may not opportunistically characterize that pay differently at various times to its economic advantage.

In *Wilkerson v. Commissioner*, 44 T.C. 718 (1965), the Government successfully argued that "retirement pay . . . is predicated on the performance of past services" and that "the right to receive . . . [retirement pay] is vested" when a "serviceman completes the required years of service and receives the absolute right to retirement pay." 44 T.C. at 722, affirmed, 368 F.2d 552, 553 (9th Cir. 1966). In the instant case, the Government conceded that "retired pay is earned compensation and not a gratuity," and added it "has never contended otherwise."[16] In *Hiss v. Hampton*,

[15]Question 4 asks whether petitioners can be deprived, without just compensation, of all benefit of their pay which was withheld during their active service to fund their "retired" pay, if their "retired" pay is in fact compensation for current standby duty. Question 5 raises the constitutionality of the current statutes as applied, which provide petitioners different pay for equivalent standby service solely because of their differences in age, a physical fact over which they have no control. Compare *Fontiero v. Richardson*, ... U.S. ....., 93 S.Ct. 1764 (1973).

[16]Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion To Dismiss 7.

338 F.Supp. 1141, 1145-46 (D.C. D.C. 1972) (three judge court), however, the Government attempted to establish the lack of monetary jurisdiction on the ground that civil service retired pay is merely an expectancy. (The court upheld jurisdiction, but assumed that there is no vested right to the continuance of such pay. 338 F.Supp. at 1146.) In *Richardson v. Reservists To Stop the War,* October Term, 1972, No. 72-1118, in which this Court has granted certiorari, the Government contends that retired pay of reservists is "paid independent of their present status and is 'in the nature of a pension.'" *Id.,* Petition for Certiorari 13. This contention in effect asserts that reservists' retired pay is a gratuity since a military pension is considered a gratuity. See *United States v. Teller,* 107 U.S. 64, 68 (1883); *Berkey v. United States,* 176 Ct.Cl. 1, 8, 361 F.2d 983, 987 (note 9) (1966).

So long as the nature of petitioners' retired pay is not authoritatively resolved by this Court, petitioners —and retired civil servants as well—are vulnerable to conflicting governmental contentions and court rulings with respect to their retirement rights. This is also true in private litigation regarding their retired pay. Accordingly, this Court should grant certiorari to dispel that uncertainty and to resolve the existing conflict in decisions noted above.

2. THE DECISION BELOW IS ERRONEOUS AND INVOLVES QUESTIONS OF GREAT PUBLIC IMPORTANCE CONCERNING THE RETIREMENT RIGHTS OF ALL FEDERAL PERSONNEL AND THE OBLIGATION OF THE UNITED STATES TO HONOR ITS COMMITMENTS TO ITS CAREER SERVANTS.

a. The decision below is erroneous and has deprived petitioners of a substantial property right.

The decision of the court below is erroneous regardless of what it assumed the nature of petitioners' retired pay to be. If the court assumed such pay is deferred compensation for past service, then its decision is in conflict with decisions of this Court. See 1b, *supra*. If the court assumed such pay is compensation for current service, then its decision conflicts with current law concerning the nature of retired pay. See below.

The decision below is also erroneous because the court dismissed petitioners' *unlitigated* constitutional claims solely on the basis of the doctrine of stare decisis. See Petition for Rehearing 3.[17] After so ruling the court stated:

> Plaintiffs' counsel admitted at oral argument that none of plaintiffs are receiving less retired pay in dollars and cents than they received at the time of their retirement. *Consequently, no property has been taken from them by the government.* . . .
>
> (Appendix at 7a, emphasis added.)

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[17]See note 11, p. 11, *supra*. The decision below was based solely on the holdings in *Akerson* and *Andrews*. Appendix at 7a. *Akerson* raised no constitutional issues, and *Andrews* raised only the issues presented by petitioners' First and Second causes of action, and then only as to officers.

This conclusion is patently erroneous. The fact that petitioners are not receiving less retired pay "in dollars and cents" than they received at the time of their retirement is irrelevant. The relevant fact is that since 1958 they have not received, and are not receiving, what they should receive under the recomputation system in effect during their service and when they retired. Petitioners' loss is substantial and admitted for the purposes of the motions below and this petition. See Petition, Exhibit 5.

That conclusion also conflicts with the decisions of this Court respecting the definition of "property" which is protected by the federal constitution. Petitioners have alleged—and the Government has not denied—that petitioners served their country in reliance upon their retired pay being computed and recomputed on the basis of the active duty base pay for each petitioner's retirement rank. This system of recomputation was based on numerous pay statutes enacted from 1870 to 1955 and on those enacted in 1956 codifying the practice of 86 years. Petitioners also contributed substantially to their expected retired pay by the acceptance of intentionally depressed active duty pay scales. Once petitioners had completely performed their commitment to the Government, they each had earned a vested right to their promised retired pay supported by their past services, their forebearance of a civilian career, and their contributions. *Mississippi ex rel. Robertson v. Miller, supra; Fisk v. Police Jury, supra;* and see *Dismuke v. United States,* 297 U.S. 167, 170 (1936) (comparing the modern civil

service system with the 19th Century military system). Compare *Perry v. Sindermann*, 408 U.S. 593, 599-602 (1972). See also *Chemical Workers v. Pittsburg Glass Co.*, 404 U.S. 157, 181 n. 20 (1971) (private industry); *Berkey v. United States, supra*, 176 Ct.Cl. at 12, 361 F.2d at 990 (public employees). On the vested right of public employees in the statutory provisions by which their future retired pay is to be computed, see, e.g., *Yeazell v. Copins*, 98 Ariz. 109, 402 P.2d 541 (1965); *Abbott v. Los Angeles*, 50 C.2d 438, 326 P.2d 484 (1958); *Allen v. Long Beach*, 45 C.2d 128, 287 P.2d 765 (1955); and see Patterson, *Legal Protection of Private Pension Expectations* 74-77 (1960).[18]

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[18]Petitioners' claims may raise different legal issues with respect to different classes of claimants. The recomputation statutes were first only suspended as to those retired on or before June 1, 1958, by P.L. 85-422, 72 Stat. 122. They were not repealed until October 1, 1963, by P.L. 88-132, 77 Stat. 210. Between June 1, 1958, and October 1, 1963, many thousands more uniformed personnel had retired. That group had no rights under the 1958 Act, but had rights under the 1956 recomputation statutes. Accordingly, the legal rights of the following classes may differ:

(1) Those retired before the effective date of the 1958 Act (approximately 212,000);

(2) Those retired after the effective date of the 1958 Act but before the effective date of the 1963 Act (approximately 179,000);

(3) Those retired after the effective date of either the 1958 Act or 1963 Act but who had fully qualified for retirement before the effective dates of either or both Acts; and

(4) Those who had substantially but not fully qualified for retirement before the effective dates of either or both Acts.

As of June 30, 1972, there were 880,664 retired members of the armed forces alone, 294,200 officers and 586,462 enlisted personnel. Department of Defense, *OASD (M&RA) Actuarial Consultant* p. 1 (November 20, 1972). The specific figures for the first and second classes are derived from data supplied by the National Association for Uniformed Services on June 5, 1973. See Appendix F at p. 27a, *infra*. No available data distinguishes the third and fourth classes, but together they could total 500,000, depending on what is considered "substantial" performance for the purposes of defining the fourth class. See Petition 28 n.9.

Nevertheless, solely in the interests of economy, Congress repudiated the Government's commitments under the recomputation system in disregard of petitioners' vested rights. That action was unconstitutional. *Lynch v. United States,* 292 U.S. 571, 580 (1934).

b. The decision below affects the retirement rights of all federal career personnel, civilian as well as military.

The decision below rejected the immediate claims of only the 2,079 petitioners herein. The court below recognized, however, that "this is a test case, the outcome of which will affect" as many as "900,000 claims of retired government personnel." Appendix at 2a. In fact, the case was filed as a class action on behalf of all such personnel. The number of persons immediately affected, therefore, commands the attention of this Court.

In addition, the potential impact of the decision below will affect the interests of all career federal personnel, civilian as well as uniformed. If Congress can repudiate its just commitments under the recomputation system, and the decision below is allowed to stand, Congress will be able to repudiate accrued rights of all federal personnel,[19] civilian as well as

[19] With the possible exceptions of those few covered by Articles II, §7, and III, §1, of the United States Constitution. Compare *Booth v. United States,* 291 U.S. 339 (1934).

military, even under the present reduced retirement system.[20]

c. Only this Court can vindicate petitioners' reliance on the United States to honor its commitments.

The court below recognized the equity of petitioners' claims, but directed petitioners to Congress:

> . . . The arguments . . . so ably expressed in plaintiffs' briefs should be presented to Congress instead of to us. . . . We understand and appreciate the dissatisfaction of the plaintiffs with the change in the[ir] retirement pay system, as they have rendered long and faithful service to our country in time of peace and war. However, if they are to get any relief, it must come from Congress . . . .
>
> (Appendix at 8a.)

But petitioners' claims have been presented to Congress. Well over 400 bills have been introduced since enactment of the 1958 Act. See Appendix G at p. 29a, *infra*. On December 29, 1972, the Special Subcommittee on Retired-Pay Revisions of the House Committee on Armed Services recommended "that recomputation legislation not be further considered by the committee." H.A.S.C. No. 92-80, 92d C., 2d S. p. 17626

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[20]Under P.L. 92-425, 86 Stat. 706, enacted September 21, 1972, Congress provided the surviving spouse and minor and dependent children of a retired member of the uniformed services a percentage of his or her retired pay in consideration of that member's acceptance of an additional reduction in such pay during his or her lifetime. If the decision below is correct, Congress may at any time repudiate that obligation as well as its obligations under the repealed recomputation system.

(1972).[21] That rejection of legislative relief was, in fact, justified by *Andrews* and *Akerson,* the very decisions of the court below relied on to deny petitioners relief herein. *Id.* at 17646-48.

Petitioners have no remedy unless this Court acts. Only this Court can correct the erroneous and unjust decision of the Court of Claims and vindicate petitioners' reliance on their Government to honor its commitments. Compare *Astrup v. Immigration Service,* 402 U.S. 509 (1971). This Court should therefore grant certiorari to determine authoritatively the vested retirement rights, if any, enjoyed by petitioners and other federal career personnel when they have fully qualified for retirement rights under an existing system. Unless this Court does so, petitioners will forever lose their rights.

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[21]In reliance on this recommendation, the Chairman of the House Armed Services Committee now sends a form letter to all those who inquire concerning recomputation which concludes: ". . . I have no plans to schedule further action on recomputation legislation." See Appendix H at p. 34a, *infra.*

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and actions of the Court of Claims in this proceeding.

August 24, 1973.

Respectfully submitted,

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(Appendices Follow)

Appendix A

In the United States Court of Claims
No. 785–71
(Decided January 18, 1973)
A. L. ABBOTT, ET AL. v. THE UNITED STATES

Francis X. Driscoll for plaintiffs. *Craig Z. Randall,* attorney of record. *Siegfried Hesse, Fred C. Dodge, Edward O. Reyes, Robert P. Brorby, Julius Kahn, III,* and *Thomas J. Titmus,* of counsel.

Arthur E. Fay, with whom was *Assistant Attorney General Harlington Wood, Jr.,* for defendant.

Before COWEN, *Chief Judge,* DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges.*

On Defendant's Motion to Dismiss Petition and Plaintiffs' Motion for Summary Judgment

SKELTON, *Judge,* delivered the opinion of the court:

Plaintiff, A. L. Abbott, and 2,078 other named plaintiffs, all of whom are retired personnel of the Armed Services or the Public Health Service, filed this suit to recover retired pay based on the active duty pay rates applicable to them, respectively, at the time of their respective retirements, plus all statutory active duty pay increases since their retirements,

from June 1, 1958, to the prseent time. This is a test case, the outcome of which will affect between 600,000 and 900,000 claims of retired government personnel, according to the plaintiffs. The plaintiffs have filed a motion for summary judgment and defendant has filed a motion to dismiss the plaintiff's petition on the ground that it fails to state a claim upon which relief can be granted. The case is before us on these motions.

The facts in this case are basically the same as those existing in the cases of *Akerson v. United States,* 175 Ct. Cl. 551 (1966), *cert. denied,* 385 U.S. 946, and *Andrews v. United States,* 175 Ct. Cl. 561 (1966). Those cases were considered together by the court and decided the same day. While some of the contentions of the plaintiffs in *Akerson* were different to those alleged by the plaintiffs in *Andrews,* the overriding central issue in those cases, considered together as they were, was whether or not the 1958 amendment to the Career Compensation Act, Pub. L. No. 85–422, 72 Stat. 122, and the Uniformed Services Pay Act of 1963, Pub. L. No. 88–132, 77 Stat. 210, deprived the plaintiffs of their property without due process of law in violation of the fifth amendment and were, therefore, unconstitutional. We have the identical issue presented to us again in the instant case. The plaintiffs contend here that they are asserting claims that were not raised in *Akerson* and *Andrews,* as will be discussed below, but they admit and allege that the fourteen causes of action set forth in their petition are based upon their contention that the above stat-

utes violate the fifth amendment and are unconstitutional. Consequently, this is the ultimate issue in the case and controls its disposition.

In 1870, Congress established what is known as the "recomputation" system for determining retired pay of retired officers of the Armed Services. Ch. 294, § 24, 16 Stat. 320. In 1885 this was extended to enlisted personnel, 23 Stat. 305. Later on the system was extended to various other departments and grades. The recomputation system provided in general that the retired pay of an officer would be computed as a percentage of the active duty base pay being paid for the rank and grade he held at the time of his retirement, and such retired pay would be recomputed thereafter from time to time so as to allow him the same percentage of *current* active duty base pay provided for officers of the same rank and grade in the active service. In other words, after his retirement, each officer would get an increase in his retired pay based on each increase of active duty base pay provided from time to time by statute for officers of the same rank and grade in the active service. This recomputation system continued through the years and was incorporated by Congress in the recodified Title 10, United States Code in 1956. This system was the law until 1958 when Congress enacted an amendment to the Career Compensation Act (May 20, 1958, Pub. L. No. 85–422, 72 Stat. 122) which provided for a six percent increase in retired pay and a six and one-half percent increase in current active duty pay. This statute had the effect of suspending, but not

repealing the 1956 provisions of Title 10, United States Code, mentioned above, which provided for the recomputation system for retired officers. The 1958 Act only deprived retired officers of one-half of one percent of what they would have received under the previously existing recomputation system because they got a flat six percent increase in retired pay, whereas officers of the same rank and grade on active duty got a six and one-half percent increase in active duty base pay. The 1958 Act also provided that officers who had retired prior to the effective date of the Act would receive retired pay based on the old law plus six percent. The plaintiffs received retired pay computed in this manner until October 1, 1963, when the Uniformed Services Pay Act of 1963 was enacted (Pub. L. No. 88–132, 77 Stat. 210). The 1963 Act repealed the provisions of the 1956 Act (Title 10, United States Code) that required recomputation and established a cost of living system which was tied to the Consumers Price Index. This new system fixed the retired pay of an officer who had retired prior to the effective date of the 1958 Act at a percentage of the active duty base pay being paid to officers of his grade and rank on June 1, 1958, plus a percentage of the increase in the Consumers Price Index thereafter. Officers who retired on or after June 1, 1958, would receive retired pay based on a percentage of the active duty base pay he was receiving for his rank and grade at the time of his retirement, plus a percentage of any increase in the Consumers Price Index after his retirement. In other words, after retirement,

the officer would no longer get the benefit of increased active duty base pay given to officers of the same rank and grade who were on active duty, but would only get a percentage of the increased cost of living index. The plaintiffs complain that what they have received by way of retired pay under the cost of living index system is far below what they would have received under the recomputation system. They seek to recover this difference on the theory that the amount thereof has been taken from them by the government without due process of law contrary to the fifth amendment of the Constitution. They contend, as did the plaintiffs in *Akerson* and *Andrews* that when they entered government service they had a contract with the United States that upon their retirement they would be entitled to retired pay that would be adjusted from time to time on the recomputation basis and that this was a vested right that they enjoyed which could not be taken from them by Congress without violating the Constitution. We decided this very question in *Andrews* when we held:

> The difficulty with this position, as defendant points out, is that there is strong authority for the counter-proposition that officers have no vested or contractual right to any particular amount of retired pay. The general rule has long been that "[a] soldier's entitlement to pay is dependant upon statutory right * * * [and not upon] common-law rules governing private contracts * * *." *Bell v. United States,* 366 U.S. 393, 401 (1961). *Cf., Leonard v. United States,* 279 U.S. 40 (1929); *United States v. McDonald,* 128 U.S. 471 (1888); *Byrd v. United States,* 103 Ct. Cl.

285 (1945); *Amchanitzky v. United States*, 81 Ct. Cl. 409, *cert. denied*, 296 U.S. 598 (1935); *Fulmer v. United States*, 32 Ct. Cl. 112 (1897); *Magaw v. United States*, 16 Ct. Cl. 3 (1880); *Lowry v. McCarl*, 79 F. 2d 144 (D.C. Cir. 1935); *Heidt v. United States*, 56 F. 2d 559 (5th Cir. 1932). And since the pay of officers in the uniformed services is within the exclusive control of Congress, it was free to limit the benefits of the 1958 active duty pay increase to members on the active duty list. [*Id.* at 563.]

See also, Abbott v. United States, 152 Ct. Cl. 798, 804, 287 F. 2d 573, 576 (1961), *cert. denied*, 386 U.S. 915.

The defendant says that we should follow our decision in *Andrews* and *Akerson* on the basis of stare decisis. The plaintiffs, on the other hand, argue that they have raised issues in this case that were not present in either of those cases, which are:

1. Retired pay is accrued compensation for past services and a deprivation thereof violates the fifth amendment.

2. The plaintiffs had a contract with the government which entitled them to retired pay based on the recomputation system and that a repudiation thereof by the government amounted to a taking of their property without due process of law in violation of the fifth amendment.

3. If retired pay is compensation for present services while on inactive duty (*i.e.*, periodic reporting of their whereabouts to the government so as to be subject to recall to active duty), plaintiffs are subject to discrimination based on age, because other retired

officers with the same rank, grade, and length of service receive more retired pay because such other officers retired later at a higher basic rate of active duty pay. They contend this denies them due process of law under the fifth amendment.

4. Plaintiffs' contributions toward the funding of their retired pay have been taken from them without just compensation in violation of the fifth amendment and should be returned to them with interest.

While some of the foregoing contentions of the plaintiffs may be couched in somewhat different language to those that were urged in *Akerson* and *Andrews*, the underlying and controlling issue in those cases and in the instant case is whether or not the 1958 and 1963 Acts described above deprived plaintiffs of their property without due process of law in violation of the fifth amendment. We decided this question adversely to the plaintiffs in those cases. The plaintiffs argue that even if this is true, our decisions in those cases were wrong and we should reconsider them. We think our decisions in those cases were correct and we follow them under the stare decisis rule. We cited the *Andrews* case with approval in *Goodley v. United States*, 194 Ct. Cl. 829, 441 F. 2d 1175 (1971).

Plaintiffs' counsel admitted at oral argument that none of the plaintiffs are receiving less retired pay in dollars and cents than they received at the time of their retirement. Consequently, no property has been taken from them by the government. They are in reality complaining about what they would have

received if the system had not been changed. The arguments in this regard so ably expressed in plaintiffs' briefs should be presented to Congress instead of to us. Congress has the power and authority under the Constitution to establish a system for the payment of retired pay for retired government personnel such as the plaintiffs, and to change the system from time to time as was done in this case. We understand and appreciate the dissatisfaction of the plaintiffs with the change in the retirement pay system, as they have rendered long and faithful service to our country in time of peace and war. However, if they are to get any relief, it must come from Congress, as this is not within our jurisdiction.

We hold that the petition of the plaintiffs fails to state a claim upon which relief can be granted. Accordingly, plaintiffs' motion for summary judgment is denied and defendant's motion to dismiss plaintiffs' petition is granted, and the petition is dismissed.

Appendix B

Former 10 U.S.C. §6149, 70A Stat. 385, enacted August 10, 1956, provided:

> Except for officers whose retired pay is computed under the Pay Readjustment Act of 1942 (56 Stat. 359), the retired pay of each retired officer of the Navy or the Marine Corps shall be computed on the basis of rates of pay provided by law, at the time of his retirement, for officers on the active list. If *after* the *retirement* of any such officer the rates of pay for officers on the active list are changed, the *retired pay* to which the officer is entitled *shall be recomputed on the basis of the new rates.* (Emphasis added.)

Similar provisions were also incorporated in the statutes cited on page 3, *supra.*

All such provisions were suspended by §§3 and 4 of P.L. 85-422, 72 Stat. 128, effective June 1, 1958, but were continued in the 1958 edition of the United States Code "containing the general and permanent laws of the United States in force on January 6, 1959." They were repealed by §5 of P.L. 88-132, 77 Stat. 214, effective October 1, 1963.

The relevant portions of P.L. 85-422 are:

> Sec. 3. (a) Notwithstanding any other provision of law, except sections 4 and 7 of this Act and subsection (b) of this section, the changes in rates of basic pay made by this Act do not increase the amount of retired pay, retirement pay, retainer pay, or equivalent pay to which any person is entitled on the day before the effective date of this Act.
>
> * * *

Sec. 4. (a) Except for members covered by section 7 of this Act and persons with two or less years of service for basic pay purposes who were retired for physical disability or placed on the temporary disability retired list, members and former members of the uniformed services who are entitled to retired pay, retirement pay, retainer pay, or equivalent pay, on the day before the effective date of this Act, shall be entitled to an increase of 6 per centum of that pay to which they were entitled on that date.

(b) Notwithstanding any other provision of law, a member of a uniformed service retired under any provision of law, or transferred to the Fleet Reserve or Fleet Marine Corps Reserve, on the effective date of this Act shall have his retired pay or retainer pay computed on the basis of the rates of basic pay set forth in the Career Compensation Act of 1949, as amended by this Act, or on the rates of basic pay set forth in the Career Compensation Act of 1949 on the day before the effective date of this Act, plus 6 per centum of that pay, whichever is greater.

* * *

The relevant portions of the Fifth Amendment of the United States Constitution are:

> No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix C

FACTUAL CHRONOLOGY REGARDING RECOMPUTATION

1870: Recomputation system established for officers. Ch. 294, §24, 16 Stat. 320.

1885: Extension of system to enlisted personnel begun. Ch. 67, 23 Stat. 305.

1885-
1920: System extended to various departments and grades on a piecemeal basis. Sen. Doc. No. 14, 90th C., 1st S. pp. 357-373 (1967).

1922: Officers, but *not* enlisted personnel, denied right to recompute retired pay on basis of new active duty scales. Ch. 212, §1, 42 Stat. 626.

1926: Congress prospectively restored recomputation for officers on basis of 1922 Act. Ch. 274, 44:2 Stat. 417. The House Report on the 1926 Act stated that the 1922 Act had been a violation of "*the basic law under which* [*they had*] . . . *gained their retirement rights.*" H. Rep. No. 857, 69th C., 1st S. p. 2 (1926) (emphasis added). The retroactive application of the 1922 Act regarding recomputation was never tested.

1926-
1930: Contributions for the funding of retirement benefits recognized. Report of Secretary of War, in Hearings before the House Committee on Military Affairs, Pt. 1, 69th C., 2d S. pp.

131, 247 (1926); Sen. Doc. No. 259, 71st C., 3d S. 62, 139 (1931). (Interdepartmental Pay Board Reports for 1929 and 1930).

1933-1935: Retired pay reduced proportionately when active duty pay scales reduced. Sen. Doc. No. 14, 90th C., 1st S. p. 372 (1967).

1948: The Advisory [Hook] Commission on Service Pay, appointed by the Secretary of Defense, recommended that (1) the imputed contributory form of payments towards the funding of military retirement be retained because (a) of the difficulty in planning for fluctuating manpower; (b) it would be an unnecessary expense to account for the funds; and (c) the Government, unlike other employers, commands the taxing power to meet its fiscal obligations; and (2) the military retirement system be overhauled in light of modern needs for technical personnel. Career Compensation for the Uninformed Services, pp. 40-48 (1948).

1949: In enacting the Career Compensation Act, Congress rejected the Hook Commission proposals for overhaul, but recognized the necessity for attracting and retaining personnel with specialized skills and training, and continued the imputed contribution method of funding. H. Rep. No. 779, 81st C, 1st S. pp. 2, 9 (1949).

1953: The Judge Advocate General (Army) concluded that all changes in active duty pay

scales should be reflected in retired pay in the absence of express legislative intent to the contrary. He relied on a number of earlier opinions of the Comptroller General to that effect. JAG(A) 1953/4120, 14 May 1953.

1954: The [Kaplan] Committee on Retirement Policy for Federal Personnel undertook a comparative study of all federal retirement systems. It noted: "Laws increasing [military] active duty pay usually stipulate recomputation of retired pay on the new basis. So general is this inclusion that *an impression has arisen that recomputation is automatic,* though the question has never been decided." Sen. Doc. No. 89 [Pt. 1], 83d C., 2d S. p. 221 (1954) (emphasis added). See also, *id.* at 231, 243, 253, 265, 274, 287, and 299.

1955: Career Incentive Act recommended by the Department of Defense to improve active duty retention rates by increasing active duty pay scales. Sen. Rep. No. 125, 84th C., 1st S. pp. 30-33 (1955).

1956: Congress incorporated the recomputation system into recodified Title 10, United States Code, so that recomputation thereafter was expressly required. Sen. Rep. No. 2484, 84th C., 2d S. pp. 125, 281, 471, 662 (1956).

1957: The report of the [Cordiner] Defense Advisory Committee on Professional and Technical Compensation identified recomputation as the *principal* benefit of military employment,

and recommended its retention despite the need to drastically upgrade active duty pay scales. Report, Volume I, pp. 136-137 (1957).

1958: The Department of Defense recommended to Congress that retired military personnel receive no pay increase. Congress nevertheless provided for a 6% increase in retired pay while providing a 6½% increase in active duty pay, thereby suspending, but not repealing, the 1956 provisions of codified Title 10, United States Code. H. Rep. No. 1538, 85th C., 2d S. pp. 7, 47 (1958).

1959: The 1958 edition of the United States Code was issued, "containing the general and permanent laws of the United States in force on January 6, 1959." It included all provisions for recomputation enacted into positive law with the recodification of Title 10, in 1956.

1961: The Study Committee of the University of Michigan, pursuant to its contracts with the Senate Armed Services Committee, concluded Congress should have changed the military retirement system in 1948 (as had been recommended by the Hook Commission) because of changed circumstances beginning with World War II. It also concluded that retirement costs are merely deferred costs of the defense effort, and that those who are "retired" in middle age, are normally unable to obtain comparable employment. Report, pp. 37, 77 (1961).

1962: The [Gorham] Defense [Department] Study of Military Compensation was completed. Among other matters, it assumed "retired" pay is deferred compensation, earned on a month-to-month basis, and should, for planning purposes, *reflect interest* at 3% even though no direct funding is involved. Cost and Value of Military Compensation, SGMC/MA-2, pp. 51-52 (1962).

1963: Congress repealed the 1956 provisions requiring recomputation, and established the current cost of living system, which was ultimately tied to the Consumers Price Index. This limited "retired" pay to a fixed percentage of the purchasing power enjoyed on the date relieved from active duty. PL 88-132, 77 Stat. 212-15.

1964: *Akerson* and *Andrews* petitions filed in Court of Claims, seeking difference in pay that would have been received under 1956 provisions, and what was actually received under the 1958 Act up to the effective date of the 1963 Act. Neither suit raised the constitutionality of the 1963 Act; and no enlisted personnel were joined in either action.

1965: The House Armed Services Committee, "for the record," formally acknowledged that active duty pay scales had *always been depressed* to reflect a contribution towards the funding of military retirement rights. The Committee

determined the rate of contribution was 6½% of total pay (basic pay, plus housing and subsistence allowances, etc.). H. Rep. No. 549, 89th C., 1st S. p. 24 (1965).

March 1966: The Report of the Cabinet Committee on Federal Staff Retirement Systems recorded the shift from the concept that retirement is a gratuity or reward for past services to the accepted view that it is an earned right, though there is no express retirement contract clearly defining the nature and dimensions of the right. H. Doc. No. 402, 89th C., 2d S. p. 18 (1966).

May 1966: Court of Claims ruled in *Akerson* and *Andrews* that the 1958 Act intended to deny recomputation on the basis of its increased active duty scales, and that public officers must accept the current statutory salary for the office held. 175 Ct. Cl. 551, 561 (1966).

1967: Volumes I and II of the [Hubbell] Report of the First Quadrennial Review of Military Compensation, required by the 1965 enactment of 37 U.S.C. §1008b, were issued. The Department of Defense recognized that its retirement system is *contributory in fact,* and recommended that it become contributory in form, since those who do not qualify for retirement, unlike civil servants, never receive back their

contributions under the present system. Report, Volume I, pp. 44-48, 56 (1967).

1968: The Report of the U. S. Veterans Advisory Commission recommended restoration of recomputation system since the effect of the 1963 Act had resulted in clear discrimination against older members who "retired" earlier under lower effective pay scales. Report, p. 72 (1968).

1969: Volumes IV and V of the [Hubbell] Report of the First Quadrennial Review of Military Compensation, addressed exclusively to the military estate system, were issued. The Department of Defense recognized that a large portion of the pay received on release from active duty is normally required to offset the *income loss* suffered as the result of the need for a second career in midlife, and that such a loss is not properly charged to military personnel, but is a public cost of the need for a youthful defense force. The study documented that while most military "retirees" receive pay for a much longer period than do civil servants, most nevertheless do not receive a comparable net lifetime benefit. Report, Volume IV, pp. S-15, 2-10; Volume V, pp. II-1, 2, 9 and 10, VII-16, VIII-6 (1969).

July
1970: The Secretary of Defense, by way of an open letter, stated that the present Administration

could not afford to remedy the injustice recognized by the President in 1968. See Petition, exhibit 6-1.

Report by the Blue Ribbon Defense Panel to The President and the Secretary of Defense on the Department of Defense noted the problem of *the necessity* of retired military personnel *to obtain civilian employment* and criticized the effect of current restrictions on their dealings with the Department of Defense. Report, pp. 180-88 (1970).

March 1971: The President appointed Interagency Committee to study the military "retirement" and survivor benefit systems.

July 1971: Volume I of the Report to the President on the Study of Uniformed Services Retirement and Survivor Benefits by the Interagency [Kelley] Committee was prepared. It recognized *the unfulfilled obligation of the Government* to those who had served under and in reliance on the recomputation system, but concluded that a return to that system was neither sound nor required in view of the Court of Claims's ruling in *Andrews*. Report, p. 7-5 (1971). It recommended, instead, a system of partial and gradual recomputation on the basis of the 1971 active duty pay scales, ac-

cording to priorities reflecting age, longevity and disability. *Id.* at 7-7.

Oct. 1971: *Abbott* petition filed, seeking either (1) the fulfillment of the Government's obligation to those who made a career choice in reliance on the recomputation system or (2) the return (by way of just compensation) of the deferred contributions made towards the rights now repudiated.

Dec. 1971: The United States moved to dismiss *Abbott* petition.

Report of the [Second] 1971 Quadrennial Review of Military Compensation, pursuant to 37 U.S.C. §1008b, recognized that "Regular Military Compensation is *depressed by 7%* to reflect an imputed contribution towards the member's retirement." Report, p. 3 (1971).

Sept. 1972: The General Counsel of the Department of Defense and the Deputy Assistant Secretary of Defense for Military Personnel Policy testified before the Subcommittee on General Legislation of the House Armed Services Committee on the *7% imputed contribution* towards military retirement which is calculated for purposes of setting *total active duty pay*. Hearings held September 19, 1972, on H.R. 4606, pp. 11, 14-15, 58, 64.

Dec. 1972: The Special Subcommittee on Retired Pay Provisions of the House Armed Services Committee recommended "that recomputation legislation not be further considered by the committee." As legal support for its recommendation, the Subcommittee relied on the Court of Claims' decision in *Akerson* and *Andrews*. H.A.S.C. No. 92-80, 92d C., 2d S. pp. 17626, 17646-48 (1972).

Jan. 1973: Court of Claims dismissed *Abbott* petition, relying on *Akerson* and *Andrews*, and directed petitioners to Congress for relief. Appendix at 7a-8a, *supra*.

April 1973: Court of Claims denied petition for rehearing in *Abbott*.

Appendix D

(1) Retired members of the regular Navy and Marine Corps are subject to recall only in time of war or national emergency. 10 U.S.C. §6481. Retired members of the regular Army and Air Force are subject to recall by the President at any time. 10 U.S.C. §§3504(a), 8504(a). If petitioners' pay were for current service, such different obligations should be reflected by different pay. Yet retired pay of all is measured in an identical manner. 10 U.S.C. §§3991, 6325, 8991.

(2) Retired reservists receive no retired pay, no matter when retired, until age 60. 10 U.S.C. §1331. See also 10 U.S.C. §273(a) (inactive standby reservists); Department of Defense Directive 1215.6, Section IV,E4, and IV,F,3 (June 12, 1971) (active reserves). Regular members of the armed forces receive retired pay immediately on "retirement," as early as age 37. See 10 U.S.C. §1401. If petitioners' pay were for current service, all who perform the same standby service should, but do not, receive the same compensation for such service.

(3) Regular members are involuntarily "retired" in mid-life, and suffer second career income losses. Such losses are not suffered by reservists (or civil service counterparts). This fact explains (1) the difference in treatment between reservists and regular members of the uniformed services, and (2) the fact that the retired pay of regular members is measured without regard to differences in their standby obliga-

tions. The only characterization of petitioners' retired pay consistent with these differences is that it is deferred compensation for their past service: (1) an income supplement until retired from a second career and (2) thereafter earned retired pay for past service supported by petitioners' contributions.

Appendix B

Charles L. Andrews, Jr., et al. v. The United States
[No. 163-64. Decided May 13, 1966]

On Defendant's Motion to Dismiss Petition and Plaintiff's Motion for Summary Judgment

Robert F. Klepinger, attorney of record, for plaintiff.

Arthur E. Fay, with whom was *Assistant Attorney General John W. Douglas,* for defendant. *Edgar H. Twine,* of counsel.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS and COLLINS, *Judges.*

LARAMORE, *Judge,* delivered the opinion of the court:

The facts in this case are identical to those presented in *Akerson, et al. v. United States, ante,* p. 551, this day decided. Plaintiffs are officers of the uniformed services who retired prior to June 1, 1958. For the period from June 1, 1958 to October 1, 1963, they received retired pay based on the active duty pay scales in effect on May 31, 1958, plus a six percent cost-of-living increase. They claim for this period additional retired pay to be based on the active duty "basic pay" provided in the Act of May 20, 1958, 72 Stat. 122. Plaintiffs' claim is not predicated on statutory interpretation as is the *Akerson* petition. Plaintiffs appear to concede that they received all to which they were entitled under the Act. They base their claim on a challenge to the constitutionality of

those provisions of the 1958 Act and the Uniformed Services Pay Act of 1963, 77 Stat. 210, which prevent them from computing their retirement pay on the basis of the 1958 Act's basic pay scales. Defendant has filed a motion to dismiss the petition and plaintiffs have filed a cross-motion for summary judgment.

The essence of plaintiffs' argument is that the United States offered to each officer who performed satisfactory and honorable service for the required number of years "retired pay at the rate of 75% of active duty pay of his rank thereafter provided by Congress." Since each plaintiff accepted that "offer" and gave the United States the bargained-for performance, each plaintiff is entitled to the promised consideration. Under the plaintiffs' theory, both the 1958 and the 1963 Acts breach the contract and, therefore, are unconstitutional under the Fifth Amendment.

The difficulty with this position, as defendant points out, is that there is strong authority for the counter-proposition that officers have no vested or contractual right to any particular amount of retired pay. The general rule has long been that "[a] soldier's entitlement to pay is dependent upon statutory right * * * [and not upon] common-law rules governing private contracts * * *." *Bell v. United States,* 366 U.S. 393, 401 (1961). *Cf., Leonard v. United States,* 279 U.S. 40 (1929); *United States v. McDonald,* 128 U.S. 471 (1888); *Byrd v. United States,* 103 Ct. Cl. 285 (1945); *Amchanitzky v. United States,* 81 Ct. Cl. 409, *cert. denied,* 296 U.S. 598 (1935); *Fulmer v.*

United States, 32 Ct. Cl. 112 (1897); *Magaw v. United States*, 16 Ct. Cl. 3 (1880); *Lowry v. McCarl*, 79 F. 2d 144 (D.C. Cir. 1935); *Heidt v. United States*, 56 F. 2d 559 (5th Cir. 1932). And since the pay of officers in the uniformed services is within the exclusive control of Congress, it was free to limit the benefits of the 1958 active duty pay increase to members on the active duty list.

This is not a harsh result. Plaintiffs do not claim that they were singled out for special unfavorable treatment. They admit that they received a substantial pay increase of six percent. In the conclusion to their brief, they concede that "Congress acted entirely within its constitutional power" in passing the 1963 legislation which ended "[t]he century old traditional concept of retirement pay," but they argue that the new system is constitutional only as it affects newly commissioned officers who are now on notice. We fail to see how plaintiffs were hurt by either the 1958 or the 1963 legislation. They would have to concede that they would have no claim whatsoever under any of their theories had Congress not raised the active duty basic pay in 1958. So they have had to hitch their wagon to the star of those on active duty. No doubt retirees from all industries and professions wish they could benefit from the high pay scales of the recent boom years, but it is difficult to see how there could be any "right" absent an express contract. Congress evidently felt that it had to raise the basic pay to attract and retain competent officers and enlisted men. Of course, the reasons for raising

retired pay were different, and it seems that the cost-of-living increase was a perfectly fair solution.

In summary, the petition fails to state a claim upon which relief can be granted. Defendant's motion to dismiss is granted. Plaintiffs' motion for summary judgment is denied. The petition is dismissed.

Appendix F

National Association for Uniformed Services
956 North Monroe Street
Arlington Virginia 22201
(703) 525-3710

5 June 1973

Dodge—Reyes & Brorby—Kahn & Driscoll
1501 N. Broadway
Walnut Creek, CA 94596

Gentlemen:

Per our last telephone conversation, here is the information you requested.

Number of all retirees as of June 30 for years shown:

1958	213,557
1959	228,389
1960	253,695
1961	289,794
1962	325,481
1963	378,509

OSD does not have exact figures, but their *estimate* for 1 June 1958 is 212,404 and for 1 October 1963 is 391,517.

I should mention that these figures represent everyone drawing a retirement check from DOD. It does

not include those who waive retirement pay to draw VA compensation. Their checks come from the VA.

Sincerely,

/s/ Robert B. Laurents
Robert B. Laurents
Col USAF Ret
Legislative Counsel

RBL:c

Appendix G

The Library of Congress
Congressional Research Service
Washington, D.C. 20540

March 23, 1973

To: Honorable Alan M. Cranston
Attention: Marcia Garrett

From: American Law Division

Subject: Bill Numbers from the 93rd to the 85th Congress Regarding Recomputation of Military Retirement Benefits

This will refer to your inquiry of March 19, 1973 requesting the bill numbers from the 93rd to the 85th Congress regarding the recomputation of military retirement benefits. Under each Congress listed below, please find the listing of such bills together with the index heading assigned by either the *Digest of General Public Bills and Resolutions* or the *Congressional Record*.

93rd Congress

Armed Forces, Pensions—Recomputation

S. 762	H.R. 749	H.R. 1806
S. 838	H.R. 1265	H.R. 2177
H.R. 293	H.R. 1422	H.R. 2189
H.R. 464	H.R. 1565	H.R. 2471
H.R. 504	H.R. 1765	H.R. 2480

93rd Congress (continued)

Armed Forces, Pensions—Equalization

H.R. 213
H.R. 612
H.R. 1608
H.R. 1814
H.R. 2447
H.R. 2606
H.R. 3304
H.R. 3737
H.R. 4460

Armed Forces, Retirement—Computation method and grade, revise

H.R. 103
H.R. 2305
H.R. 2737
H.R. 2965
H.R. 4610

92nd Congress

Retired Military Personnel

Retired pay computation: S. 377, 943, 1350; H.R. 140, 179, 236, 324, 349, 494, 509, 522, 543, 608, 711, 713, 724, 774-776, 872, 1198, 1221, 1290, 1308, 1324, 1333, 1363, 1666, 2197, 2307, 2308, 2344, 2448, 2452, 2468, 2525, 3155, 3342, 3580, 3845, 3851, 3960, 4003, 4161, 4186, 4330, 4351, 4448, 4560, 4706, 4725, 5207, 5264, 5278, 5353, 5373, 5507, 5826, 5850, 5872, 6200, 6378, 6402, 6509, 6644, 6871, 7261, 7400, 7739, 8292, 9276, 10087, 10271.

Retirement

Recomputation: H. R. 12529, 14524, 14643, 14662, 14687, 14871, 14916, 15858, 16216, 16890.

Armed Forces—Retirement

Recomputation: H. R. 14524, 14643, 14662, 14687, 14871, 14916, 15858.

91st Congress

Armed Services—Retirement Computation

Computation: S. 1256, 2317.
H. R. 387, 3327, 4186, 4316, 4585, 5176, 5526, 5547, 5576, 5815, 6174, 6238, 6714, 6756, 7076, 7569, 8030, 8862, 9861, 10933, 11637, 13356, 13839, 13943, 14621.
H. R. 17492, 18304, 19498

Armed Services—Retirement

Pay equalize: S. 364.
H. R. 138, 167, 220, 310, 425, 579, 667, 825, 1242, 1378, 2086, 2389, 2679, 2721, 3787, 4797, 5564, 6217, 7190, 7700, 8026, 8407, 8414, 9408, 9458, 9716, 10630, 10736, 10839, 11019, 11514, 12599, 13096, 13235, 13356, 13449, 13484, 13943, 14004, 14078, 14349, 14358, 14468.

Pay equalize: H. R. 15797, 17493, 17600, 17807, 17859, 17951, 19201, 19431, 19796, 19869.

90th Congress

Armed Services—Retirement Computation
S. 937, H.R. 5943

Armed Services—Retirement

Pay equalize: S. 1877, 2170.
H. R. 243, 594, 796, 909, 2376, 3116, 3302, 3338, 3573, 5280, 5725, 5917, 6302, 7482, 8274, 8761, 11239, 11240, 11432, 11437, 11468, 11754, 12385, 12558, 12656, 12821, 12835, 12873, 13680, 13721, 13880, 14406.

90th Congress (continued)

Pay equalize: S. 3618.
H. R. 15102, 15507, 15542, 15620, 15669, 15732, 16021, 16060, 16122, 16212, 16774, 17000, 17592, 17652, 17673, 17710, 17717, 17719, 18117, 18246, 18463, 18539, 18755, 19021, 19782, 20130, 20424, 20425.

89th Congress

Retirement, Military, Computation of pay
S. 540, H.R. 5256

Computation of pay:
H. R. 12183, 13149, 13868, 14057, 14484, 14966, 15474, 15634, 15700, 15961, 16015, 16161, 16174, 16287, 16333, 16424, 16554, 16592, 17244, 15739.

Retirement, Military, Computation of service
S. 173, H.R. 1990

Retirement, Military, Pay equalization
H.R. 2022

Pay, equalization: H. R. 13149, 13868, 14966, 15474, 15634, 15700, 15961, 16015, 16161, 16174, 16287, 16333.

88th Congress

Retirement, Military, Computation of pay
S. 2091, H.R. 6000, 7540

Retirement, Military, Pay equalization

Pay, equalization S. 401, 658, 2081.
H. R. 361, 995, 1022, 1621, 2850, 3010, 3315, 4249, 5915, 5967, 6067.

87th Congress

Retirement, Military Pay equalization
Pay, equalization S. 401, 626.
H. R. 131, 174, 199, 1167, 1169, 1188, 1236, 1758, 2290, 2695, 2929, 2957, 3153, 3304, 3666, 3871, 3955, 4331, 4779, 4891, 6177, 6533, 7282.
H. R. 9514

Retirement, Military Pay for Service Prior to June 1, 1958
H.R. 4330

86th Congress

Retirement, Military pay equalization
Pay, equalization (S. 269, 541; H. R. 703, 807, 957, 1866, 1969, 1982, 1997, 2255, 2464, 2469, 2757, 2768, 2801, 2879, 2912, 2940, 2973, 3015, 3019, 3037, 3164, 3210, 3284, 3328, 3373, 3691, 4007, 4215, 4321, 4378, 4461, 4534, 4592, 4629, 4721, 4804, 4813, 4885, 4917, 5113, 5129, 5405, 5791, 6357, 7322, 7442, 8265).
H.R. 9304, 10274, 11318

Retirement, Military Pay Prior to June 1, 1958
H.R. 11812

85th Congress

no relevant bills found

/s/ Thomas N. Lyons
Thomas N. Lyons
American Law Division

Appendix H

U.S. House of Representatives
Committee on Armed Services
Washington, D.C. 20515
Ninety-third Congress
F. Edward Hebert, Chairman

Armed Services Committee Announcement Concerning Recomputation of Military Retired Pay

Many people have written the Committee on Armed Services expressing views on recomputation of military retired pay. Because of the volume of mail, it is necessary to take this means of acknowledging correspondence.

In the closing days of the 92d Congress the Special Subcommittee on Retired-Pay Revisions held extensive hearings on the matter of recomputation. A copy of the subcommittee's report is enclosed.

Individuals should read the subcommittee's report in its entirety before forming a judgment as to the government's obligation in this matter. The report was approved unanimously by the members of the subcommittee.

In view of the subcommittee's thorough study and recommendations, I have no plans to schedule further action on recomputation legislation.

/s/ F. Edw. Hebert
F. Edw. Hebert
Chairman

Enclosure
June 18, 1973

SUPREME COURT, U. S.
SEP 26 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-353

A. L. ABBOTT, et al., *Petitioners*

vs.

THE UNITED STATES, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

Brief of the National Association of Retired Federal Employees, Amicus Curiae, in Support of Petitioner

JOHN A. OVERHOLT
State National Bank Building
10400 Connecticut Avenue
Kensington, Maryland 20795
Attorney for Amicus Curiae

IN THE

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A. L. ABBOTT, et al., *Petitioners*

vs.

THE UNITED STATES, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

Brief of the National Association of Retired Federal Employees, Amicus Curiae, in Support of Petitioner

The National Association of Retired Federal Employees appears *amicus curiae*, with consent of all parties, in support of petitioner.

INTEREST OF AMICUS CURIAE

The National Association of Retired Federal Employees, hereinafter referred to as NARFE, was organized in 1921, and incorporated as a non-profit corporation under the laws of the District

of Columbia in 1947. Its membership is restricted to retired civilian officers and employees of the United States, and of the Government of the District of Columbia, and their spouses; present officers and employees who have reached the age of voluntary retirement, and survivors and dependents of former officers and employees who are receiving survivor annuities. It has more than 175,000 members, scattered throughout the United States and in foreign countries. There are about 1,000 local Chapters and 46 State Federations. Among the objects and purposes set forth in its Articles of Incorporation are:

"(a) To sponsor and support legislation, rules and regulations beneficial to annuitants and potential annuitants of the civilian public service.

"(b) To oppose legislation, rules and regulations inimical to the interests of annuitants and potential annuitants.

"(c) To promote the general welfare of annuitants and potential annuitants to the civilian public service.

"(d) To serve and advise retired officers and employees with respect to their rights under retirement law.

"(e) To cooperate with other organizations and associations in furtherance of the general objectives of this corporation."

Additional goals declared in the Preamble to the Association's By-Laws are as follows:

"The Association is deeply concerned in the problems, welfare, and status of all of the aged and aging in our Nation. Foremost among these are health, medical research and treatment, and hospital and dental care; in the area of social gerontology are economic security, gainful occupation, housing, recreation, spiritual welfare, civic and philanthropic interest, education, and kindred matters, which stimulate their lives and utilize their tal-

ents and experience as a potent segment of our population. It is the duty of the Association to align itself with public agencies, private organizations, and individuals devoted to leadership in these aims."

Since this case involves questions relating to the economic well-being of persons receiving retirement annuities based on active duty service to the United States, NARFE is constrained to offer its support, despite the fact that the service involved here is of a military nature, while the services which constitute the basis for annuities received by the members of NARFE were of a civilian character. There is also the further fact that some members of NARFE are directly interested in the case as the result of combined military and civilian careers in the public service.

SUMMARY OF FACTS

Petitioners are former members of military services of the United States who retired at a time when laws governing their retirement benefits were substantially the same as they had been throughout their active duty careers. Such laws provided that retirement benefits be based on a fixed percentage of active duty pay for the same rank and grade from which retired, and that whenever active duty pay rates were raised or lowered, the benefits of retired persons would be raised or lowered on the same percentage basis. After their retirement, Congress changed the laws governing their retirement benefits, eliminating any possibility of reducing such benefits, and providing periodic percentage increases to match increases in the cost of living as reflected on a national basis in the Consumer Price Index. This change introduced into the military retirement system a cost-of-living escalator plan previously added to the Civil Service Retirement System, under which there had never been any provision whereby retirement annuities could be reduced. It should be noted that during

the depression years of the 30's when there were reductions in compensation for active duty civilian employees and members of the military services, there were corresponding reductions of retirement benefits for those retired from the military services but no reductions in retirement benefits of retired civil employees.

During recent years active duty compensation, both military and civilian, has increased at a much higher rate than the cost of living as measured by the Consumer Price Index, and the retirement benefits of the petitioners are not as great as they would have been under the laws in effect at the time of their retirement. For this reason the petitioners seek a determination by the Court that the change in the laws after their retirement operated to deprive them of property rights without due process of law.

SUMMARY OF ISSUES

Although presented in the form of five questions, the main issue presented in the petition is whether a person retired from a military service has a vested right to an annuity computed on the basis of laws that had been in effect throughout his active duty period and had continued unchanged through his retirement date, and the related issue as to whether such vested right is a property right which cannot be taken away without due process of law.

ARGUMENT

Annuities under the Civil Service Retirement System, and retirement benefits under military retirement laws, are vested rights to the extent that the active duty performance on which such benefits are based has been completed and the full faith and credit of the United States is pledged to the payment of such benefits. They are vested rights also of such a character that the United States is committed to make adjustments as necessary to compensate for loss of buying power due to inflation which re-

tired persons and other annuitants and beneficiaries are powerless to avoid.

On the other hand, the term "vested" is sometimes used to connote "fixed" as implying not subject to change, or "frozen." This concept of vested rights to annuities could be a severe blow to annuitants under the Civil Service Retirement System where many retired employees and their survivors are receiving substantially higher benefits than those provided under laws in effect when active duty service was being performed, and on the date of retirement.

Our concept of vested rights to benefits under retirement systems should be that those receiving retirement benefits based on former service should receive all that is equitable in the public interest. This concept will maintain morale and confidence among those in active duty who are looking forward to retirement, preserve the security of those dependent upon such benefits and inspire the respect of citizens generally.

CONCLUSION

We recommend that petitioners' writ of certiorari be granted, in order that a proper review may be given to the issues presented.

Respectfully submitted,

JOHN A. OVERHOLT
State National Bank Building
10400 Connecticut Avenue
Kensington, Maryland 20795
Attorney for the National Association of Retired Federal Employees

SUPREME COURT, U. S.

No. 73-353

RECEIVED
OCT 17 1973

In the Supreme Court of the United States

OCTOBER TERM, 1973

A. L. ABBOTT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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No. 73-353

A. L. ABBOTT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioners, retired personnel of the uniformed services, contend that the statutory provisions under which military retirement pay is increased to reflect cost-of-living increases unconstitutionally deprive them of property without due process.

The development of the present retirement pay system for the uniformed services, *i.e.*, the Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration (see 37 U.S.C. 101(3); 84 Stat. 2090), is described in the opinion of the court below (Pet. App. 3a-5a). In brief, between 1870 (16 Stat. 320) and 1958, retirement pay was based upon the "recomputation system." Retired personnel received a specified percentage of the current active-duty basic pay for the rank and grade they held at retirement. Whenever the basic pay for active-duty personnel was changed, the retirement pay was also recomputed.

In 1958, the recomputation system was suspended by an amendment to the Career Compensation Act (72 Stat. 122, 128), which provided a six and one-half percent increase in active-duty pay, but only a six percent increase in retirement pay. In 1963 the recomputation system was repealed, and the present system was established by the Uniformed Services Pay Act of 1963 (77 Stat. 210). Retired personnel now receive a percentage of the active-duty basic pay in effect at the date of their retirement or 1958, whichever is later, plus an additional amount based upon increases in the Consumer Price Index. See 10 U.S.C. 1401a. Retirement pay is not reduced to reflect decreases in the Consumer Price Index (cf. Pet. App. 7a).

Petitioners claim (Pet. 18-19) that they have been deprived of property without due process to the extent that the retirement pay increases they have received under the present system are less than increases would have been under the recomputation system, assuming it had remained in effect and assuming past increases in active-duty pay would have been unaffected. In rejecting this same claim in *Andrews* v. *United States,* 175 Ct. Cl. 561, 563, the Court of Claims held that retired "officers have no vested or contractual right to any particular amount of retired pay." Rather, it is dependent on statutory enactment. See *Bell* v. *United States,* 366 U.S. 393, 401. Moreover, as the court below noted in adhering to this principle in the present case, all petitioners now receive more retirement pay than when first retired (Pet. App. 7a).

In *Richardson* v. *Belcher,* 404 U.S. 78, and *Flemming* v. *Nestor,* 363 U.S. 603, this Court held that the reduction or complete withholding of Social Security benefits did not constitute a deprivation of "property" within

the meaning of the Due Process Clause, even though such benefits are financed in part by the beneficiary's contributions. With regard to retirement pay, as with Social Security benefits, the analogy to "property" cannot "be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement," *Richardson* v. *Belcher, supra,* 404 U.S. at 81.[1] In holding that petitioners' interest in retirement pay increases under the recomputation system was not a vested property right, the Court of Claims' decision is thus consistent with this Court's holdings in *Nestor* and *Belcher.* See also, *Fleming* v. *Rhodes,* 331 U.S. 100.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[1] Because the present controversy pertains only to the method of computing post-retirement increases in retired pay, it is unnecessary to decide the primary issue presented by petitioners (Pet. 10-16), *i.e.,* whether, in general, retirement pay is deferred compensation for past services or compensation for present standby duty or a combination of both. If retirement pay is for past services, the expectation of specific pay increases is too speculative at the time the services are performed to be deemed a vested property right. If retirement pay is for present services, no right to a specific payment vests prior to the performance of the services.

[2] Petitioners also suggest that the present retirement pay system is unconstitutionally discriminatory because rates of retirement pay vary depending upon the recipient's date of retirement (Pet. 3, 7-9). The present system, however, is not so devoid of a rational basis as to offend the concepts of equal protection inherent in the Due Process Clause. See *Belcher, supra,* 404 U.S. at 81. Moreover, petitioners' allegation of discrimination between regular and reserve servicemen, both of whom retire at age 37 (Pet. 8-9), ignores the fact that the retired reservist, unlike the retired regular, cannot receive any retirement pay until he attains age 60. 10 U.S.C. 1331.

10DJ-1973-10

SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

In the Supreme Court

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United States

OCTOBER TERM, 1973

No. 73-353

A. L. ABBOTT, et al., *Petitioners,*

vs.

THE UNITED STATES, *Respondent.*

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners submit the following reply to the arguments first raised in the memorandum for the United States in opposition to the petition for a writ of certiorari.

1. The Government's reliance on the social security cases is ill founded and underscores the importance of granting a writ to resolve the important questions of law presented.

The Government does not deny that the petition raises important questions of law affecting the rights of all retired federal employees. Instead it requests that the writ be denied on the basis of a new argument which was not raised or considered by the court below.

Petitioners presented seven constitutional claims for resolution by the Court of Claims, each of which is dependent on the nature of their retired pay. (See Pet. 11, n. 11.) The court below rejected all of them on the ground of stare decisis, the sole ground of the Government's motion to dismiss. (See Pet. 7a; Defendant's [Opening] Brief 2.) That ground was demonstrably erroneous (See Petition for Rehearing 3)[1] and the Government's memorandum does not attempt to justify the decision below on that ground.[2]

The Government now contends that *Andrews v. United States,* 175 Ct. Cl. 561 (1966), is "consistent with this Court's holdings in *Nestor* and *Belcher.*" (MIO 3.)[3] The Government thus seeks to extend the social security cases to the military retirement system.

The Government's contention that retirement pay is analogous to social security benefits is not sound. The proper analogy is to private retirement plans. Social security payments are in the nature of welfare benefits. Those benefits are funded by payroll taxes from the active work force and *private* employers. There is

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[1]The issues raised in petitioners' third through seventh causes of action were not raised or considered in *Andrews v. United States,* 175 Ct. Cl. 561 (1966). The same is true with respect to the issues raised in the first and second causes of action as they relate to enlisted personnel. (See Pet. 11 n.11.)

[2]The Government notes the basis of the court's ruling below, but only as it relates to petitioners' first and second causes of action. It makes no argument that the court below correctly applied the doctrine of stare decisis to the issues raised herein but not raised in *Andrews.* Memorandum In Opposition 2-3 (hereafter cited as MIO).

[3]*Flemming v. Nestor,* 363 U.S. 603 (1960); *Richardson v. Belcher,* 404 U.S. 78 (1971).

no employer-employee relationship between the recipient and the Government. The relationship is that of aged or dependent citizen and Government. The operative relationship between the United States and petitioners and all other retired federal employees is that of employer and employee. The consideration for petitioners' retirement pay is not only the contributions withheld from their salary, but also their career service to the United States and their concurrent forbearance from seeking civilian employment. *Dismuke v. United States,* 297 U.S. 167, 170 (1936). Moreover, the retirement contributions of federal officers and employees are not taxes. Otherwise the contributions of federal civil service employees would not be refunded when retirement benefits are denied. See, e.g., 5 U.S.C. §8316.[4]

The retroactive denial of social security benefits was upheld by this Court on the ground that there is no "accrued" property right to such benefits even though a recipient's taxes supported similar benefits for others in the past. *Flemming v. Nestor,* 363 U.S. 603 (1960).[5] Unlike social security recipients, peti-

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[4]Petitioners seek a refund of their contributions if their recomputation rights are not restored. (See Pet. 11, n.11.)

[5]"The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to 'spend money in aid of the "general welfare," ' . . . whereby persons gainfully employed, and those who employ them, are *taxed* to permit the payment of benefits to the retired and disabled, and their dependents. Plainly the expectation is that many members of the present productive work force will in turn become beneficiaries rather than supporters of the program. But each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree

tioners seek the retirement rights they earned pursuant to the statutes in effect when their active service was performed. *Mississippi ex rel. Robertson v. Miller,* 276 U.S. 174, 179 (1928); *Bell v. United States,* 366 U.S. 393, 401 (1961). The crucial distinction is that social security benefits are *provided* by the Government on the basis of *need,* while retirement benefits are *earned* on the basis of *service.*

The effect of the application of *Nestor* and *Belcher* to petitioners would be that no public officer or employee of the United States has any vested right to his earned retirement benefits. At any time the Government could reduce or completely eliminate retired pay and repudiate its contractual obligations to its employees and officers.[6]

A private employer must provide his retired employees the promised retirement benefits or refund their contributions deducted from their wages in anticipation of those benefits. See *Chemical Workers*

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to which he was called upon to support the system by *taxation.* It is apparent that the *noncontractual interest* of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments." (363 U.S. at 609-610, emphasis added.)

[6]The Government conceded below that petitioners' "retired pay is earned compensation and not a gratuity." (Defendant's Reply Brief 7.) Now it contends that such earned pay is not "property" entitled to constitutional protection, relying on *Richardson v. Belcher,* 404 U.S. 78, 81 (1971). (MIO 3.)

A soldier's earned pay is a property right which is protected by the federal constitution. (See Pet. 13, 18.) Thus, the Government's attempt to equate petitioners' retired pay to social security benefits is tantamount to a repudiation of its concession below which is a part of the certified record in this case.

v. Pittsburgh Glass Co., 404 U.S. 157, 181 n.20 (1971). Unless *Nestor* has overruled *Mississippi ex rel. Robertson v. Miller, supra, sub silentio,* the United States in its capacity as employer must provide petitioners' promised retirement benefits or refund their retirement contributions.

Certiorari was not sought in *Andrews* and this Court did not have the opportunity to review the nature of military retired pay. In view of the Government's expressed intent to extend the social security cases to federal retired pay it is of paramount importance that this Court determine the precise nature of federal retirement benefits.

2. Assuming the Government's reliance on the social security cases is well founded, petitioners are nevertheless entitled to the full benefit of their retirement contributions, and the Government's delay in asserting that defense will deprive them of that property right unless this Court grants the writ.

The Government now contends that petitioners' interest in their retirement pay is not "property" within the meaning of the due process clause. (MIO 2-3.) However, it does not dispute petitioners' statement of facts, which establishes that petitioners contributed substantially to the funding of their retired pay. (Pet. 5.)

Since petitioners' retirement contributions are not taxes, petitioners are entitled to the full benefit of those funds even if they have no retirement rights in light of *Nestor*. (See 1, *supra*.) The Government continues to argue (albeit for new reasons) that the nature of petitioners' retired pay is not relevant to

the issues raised by their claims.[7] This argument is unsound and the Government's reliance on the social security cases demonstrates that it is imperative that that issue be resolved now, wholly apart from the conflict of decisions already noted in the petition.

If petitioners' pay is for current standby duty, they have not received and will not receive any retirement pay. In that event, they are entitled to a full refund of their contributions, plus interest.

If their retired pay is deferred compensation for past services, petitioners are entitled to recover their contributions to the extent that those contributions, plus interest, exceed the net benefit they will receive under the present system, taking into account the income losses they have suffered and will suffer. (See Pet. 6-8.)

In either event, the Court of Claims should be directed to determine the amount of contributions to which each petitioner, and each member of the class petitioners represent, is entitled and to enter judgments accordingly.

The Government's new argument was not raised below, however. Assuming its validity, petitioners

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[7]See MIO 3, n.1. The Government misstates that petitioners seek recognition of an earned right to "specific pay increases." They seek restoration of a specific and objective means of measurement and adjustment of their retired pay. The amount they will actually receive is unknown in advance. That is also true of the current system which adjusts retired pay in accordance with the Consumer Price Index. Both systems are equally certain as to how petitioners' pay will be determined, and equally uncertain as to the actual amount their pay will be at any particular time. This fact does not render such rights "speculative," however. Many enforceable contracts, such as grain future contracts, are "speculative" in that sense.

have no remedy unless this Court grants the writ and remands the case to the Court of Claims with appropriate directions. A simple denial of the petition will forever preclude petitioners from relief even though they would otherwise be entitled to a refund of their contributions in whole or in part.

CONCLUSION

The Government below successfully avoided resolution of the merits of petitioners' claims by reliance on stare decisis. It has abandoned that defense here, but asks this Court to deny petitioners all relief on the basis of new arguments which neither petitioners nor the court below have had the opportunity to consider on their merits.

Wherefore, petitioners request the Court to grant the writ, or remand the case with directions that the Court of Claims consider the petition below on its merits in light of the Government's new contentions.

Respectfully submitted,

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SUPREME COURT, U. S.
FILED
DEC 6 1973
MICHAEL RODAK, JR., CLERK

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PETITION FOR REHEARING

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A. L. ABBOTT, et al., *Petitioners,*

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THE UNITED STATES, *Respondent.*

PETITION FOR REHEARING

Petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered November 12, 1973, and (2) granting the petition. As grounds for this motion, petitioners state the following:

1. The decision below misapplied the doctrine of stare decisis to petitioners' unlitigated constitutional claims in direct conflict with a decision of the Ninth Circuit.

Petitioners presented herein seven constitutional claims relating to their retired pay. Five of these claims had never before been presented to any court.

See Pet. 10-11.[1] The Court of Claims, after noting some of these new claims, nevertheless dismissed the petition solely on the ground of stare decisis! This misapplication of the doctrine of res judicata in the guise of stare decisis to the unlitigated claims was clearly erroneous. E.g., *Webster v. Fall*, 266 U.S. 507, 511 (1925); *United States v. Mitchell*, 271 U.S. 9, 14 (1926); *United States v. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952). See also *Powell v. McCormack*, 395 U.S. 486, 497-99 (1969).[2]

---

[1]Petitioners' claims are:

First, if their retired pay is deferred compensation for past service, petitioners sought:

(a) Restoration of the right to recomputation or just compensation for the taking of that right. Petition 23-29 (First and Second Causes of Action); or,

(b) Recomputation on reaching age 62, on the grounds that their retired pay (i) could not rationally be considered current standby pay after each reaches the mandatory age of retirement; and (ii) is not standby pay before reaching that age, but a second career income supplement. Petition 29-33 (Third and Fourth Causes of Action).

Second, if their "retired" pay is for current reduced service, petitioners sought:

(c) Equal pay for equal standby service. Petition 33-35 (Fifth and Sixth Causes of Action); and/or,

(d) The return of the contributions they made towards the funding of their retired pay, plus interest. Petition 36-37 (Seventh Cause of Action).

Only those claims in subparagraph (a) were presented in *Akerson v. United States*, 175 Ct.Cl. 551 (1966), and *Andrews v. United States*, 175 Ct.Cl. 561 (1966), relied on by the court below.

[2]The erroneous nature of the ruling below is underscored by the fact that the Government did not seek to uphold the dismissal on the ground of stare decisis. Instead, it relied on a new contention not presented to the Court of Claims. See M10 2-3. As noted in Petitioners' Reply Memorandum, the Government's new position should entitle petitioners to a refund, in whole or in part, of their retirement contributions. PRM 6. That conclusion also follows if this Court's decision in *United States v. Tyler*, 105 U.S. 244 (1882), which has never been expressly overruled, is still operative.

The court justified its ruling as follows:

> "While some of the . . . contentions of the plaintiffs may be couched in somewhat different language to those that were urged in *Akerson* and *Andrews, the underlying and controlling issue* in those cases and in the instant case *is whether or not the 1958 and 1963 Acts* described above *deprived plaintiffs of their property without due process of law in violation of the fifth amendment.* We decided this question adversely to the plaintiffs in those cases. The plaintiffs argue that even if this is true, our decisions in those cases were wrong and we should reconsider them. We think our decisions in those cases were correct and *we follow them under the stare decisis rule. . . .*" (Emphasis added.)
>
> (Pet. 7a.)

This reasoning is fallacious,[3] and in direct conflict with the Ninth Circuit's decision in *Menglekoch v. Industrial Welfare Comm'n,* 442 F.2d 1119, 1124-25 (1971), which held the unsuccessful assertion that a statute violated a specific constitutional clause on one theory does not bar a subsequent challenge of the same statute on a different theory even though based on the same clause. See also *Baker v. Carr,* 369 U.S. 186 (1962).

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[3]In the first place, three of petitioners' seven causes of action, including their claim for a refund of their retirement contributions if they have no retirement rights, are founded on the taking rather than the due process clause of the Fifth Amendment. Secondly, the due process clause incorporates a number of different constitutional guarantees. Claimants in *Andrews v. United States,* 175 Ct. Cl. 561 (1966), sought vindication of their contractual rights under that clause. Petitioners herein also sought equal protection of the laws, which is likewise guaranteed by that clause.

If the decision below is allowed to stand, and is followed, it will severely hamper the growth of constitutional doctrine. Accordingly, this Court should grant a rehearing to resolve the conflict between the decision below and *Menglekoch*.

2. Because of the exclusive jurisdiction of the Court of Claims, the erroneous decision below will bar further consideration of the unresolved merits of the claims presented herein unless this Court exercises its power of supervision.

Petitioners' military retirement rights have been substantially abridged since 1963. It is improbable, therefore, that the merits of the claims presented herein (left unresolved by the erroneous application of stare decisis below) can be litigated in any other forum by others similarly situated. Similar claims will most likely exceed $10,000,[4] and the Court of Claims has exclusive jurisdiction over such claims. 28 U.S.C. §1491. Despite its erroneous nature, the decision below will be given stare decisis effect by the Court of Claims. Unless this Court corrects that decision, therefore, its error will be indefinitely perpetuated with little probability of a conflicting decision in one of the circuits. See *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50 (1938).

Moreover, the Court of Claims is unique in being the only court of first impression of the United States from which there is no right of appeal.[5] See 28 U.S.C. §1255. In any other federal trial court an

[4]See Exhibit 5 of the Petition below for examples of the magnitude of the claims.

[5]Except the rare cases in which this Court exercises its original jurisdiction.

erroneous ruling on a dispositive motion which denies any consideration of the merits of the claims presented is subject to correction on appeal.[6] This fact, combined with the court's exclusive jurisdiction, calls for closer scrutiny by this Court, and suggests a special need for correction of clearly erroneous decisions. Stern & Gressman, SUPREME COURT PRACTICE 189 (4th ed. 1969).

The effect of the denial of a rehearing will be not only to condone a clearly erroneous decision, but will also permanently bar consideration of the merits of the claims left unresolved herein.[7] In such circumstances, the petition for rehearing should be granted. *Schriber-Schroth Co. v. Cleveland Trust Co., supra.*

3. When the Court of Claims acts as a trial court, the denial of any review deprives petitioners equal protection of the laws.

Petitioners were compelled to file their claims in the Court of Claims unless they limited them to $10,000. 28 U.S.C. §§1346(a)(2), 1491. They were,

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[6]Normally, claims filed in the Court of Claims are initially heard by a commissioner, who prepares findings of fact and conclusions of law on the merits.. Ct. Cl. R. 34(h). Exceptions (with supporting briefs) may be filed to his findings and conclusions, in which case the Court of Claims, acting more as an appellate court, affirms, overrules, or modifies the commissioner. Ct. Cl. R. 134, 136. But dispositive motions are normally heard by the court alone. Ct. Cl. R. 146(a). In such cases, as here, there are no findings of fact and conclusions of law on the merits of the claims presented. See Ct. Cl. R. 147(a).

[7]Since filing the petition for certiorari (see Pet. 29a-34a), Congress again made clear that there is no reasonable expectation for legislative relief when it struck a Senate provision for one time recomputation from the Defense Appropriation Bill. See *Navy Times*, October 24, 1973, pp. 1, col. 3, 47, col. 6.

therefore, effectively denied any right of an appeal.[8] 28 U.S.C. 1255. The jurisdictional grants of the Tucker Act thus discriminate procedurally against claimants with substantial claims against the Government. Compare 28 U.S.C. §1291.

It may be rational to require substantial claims to be presented in Washington, D.C., to a specialist court of seven judges, rather than in any district to a single, generalist judge. But the rationality of denying larger claimants a right of appeal which smaller claimants enjoy does not follow, particularly when, as here, the Court of Claims acts as a trial rather than as a reviewing court.

Petitioners are aware of the statements and holdings that there is no due process right to an appeal. E.g., *Luckenbach S.S. Co. v. United States,* 272 U.S. 533, 536 (1926) (Court of Claims); *McKane v. Durston,* 153 U.S. 684, 687 (1894) (state criminal proceedings); *The "Francis Wright",* 105 U.S. 381, 386 (1882) (Supreme Court appellate jurisdiction). But there is an equal protection right to an appeal. *Griffin v. Illinois,* 351 U.S. 12 (1956); *Rinaldi v. Yeager,* 384 U.S. 305 (1966). And there is no rational basis for denying claimants an appeal based on the amount of their claims. Those with claims against the Government in excess of $10,000 should also be entitled to an independent review to insure a fair trial.[9]

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[8]For example, an Army colonel or Navy captain who retired before 1958 with thirty years service would be required to waive more than two-thirds of his claim. See Petition below, Exhibit 5-10.

[9]There is a due process right to *fair* trial on the merits. *Ward v. Village of Monroeville,* 409 U.S. 57 (1972). Whatever the ultimate

Unless this Court grants review, therefore, petitioners will be denied equal protection of the laws as guaranteed by the due process clause of the Fifth Amendment. Accordingly, this petition for rehearing should be granted.

CONCLUSION

For the reasons set forth above, as well as those in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully, submitted,
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resolution of the merits of their claims, petitioners were entitled to equal treatment with other litigants. *Truax v. Corrigan*, 257 U.S. 312, 332, 334 (1921); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). They were, however, arbitrarily denied that right. There was no basis in fact for the Court of Claims' reliance on stare decisis. Nevertheless, that court deliberately dismissed petitioners' claims without consideration of their merits, a right it accords all other claimants before it. See, e.g., *Andrews v. United States*, *supra*, n. 3.

Certificate of Counsel

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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